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In the Supreme Court of the State of Utah

STATE OF UTAH, by and through its ROAD
COMMISSION; D. H. WHITTENBURG,
Chairman, and LAYTON MAXFIELD and
LORENZO J. BOTT, members of the State
Road Commission,

Plaintiff and Petitioner,

vs.

BOLEY, INCORPORATED, a corporation,
et al,

Defendants,

and

BOYD W. CALTON and MARY CALTON,
Intervenors and Respondents.

**CASE
NO. 8274**

Brief of Intervenors and Respondents on Intermediate Appeal

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Brief of Intervenors and Respondents on Intermediate Appeal

STATEMENT OF FACTS

Because we do not believe the appellant's statement of facts properly presents the intervenors' position in this intermediate appeal, we shall restate them in the light of the intervenors' theory of the case.

The issue on this intermediate appeal is whether, when the State of Utah actually takes property for a public use in connection with a highway project, and brings eminent domain proceedings against some of the property owners along said project, a property owner whose land is in fact taken, though neither he nor the particular property is named in the complaint, may properly intervene in that action to have his constitutional right to just compensation for the taking determined.

State Highway Project No. 1524 involved the widening of U. S. Highway No. 50—89—91, between the cities of American Fork and Lehi, Utah. In connection with the acquisition of rights of way for this project, the State of Utah, on February 17, 1954, filed this action in the District Court of Utah County to condemn certain parcels of land along this right of way. These are shown on the Exhibits to the complaint on file herein and on page 3 of the appellant's brief.

On July 21, 1954, the intervenors filed in this condemnation action a motion and plea in intervention wherein it is alleged, among other things, that the intervenors hold a leasehold estate in certain real property along this right of way, that the intervenors were in open, continuous and uninterrupted possession of this leasehold estate at the time of the construction of this project and during the time of this action, and that the State of Utah, in connection with this road project, and without notice to the intervenors, without opportunity for them to be heard, and without due process of law, entered upon a portion of this leasehold estate to the exclusion of the intervenors. The plea in intervention prays that the state be compelled to compensate

the intervenors for the portion of the leasehold estate thus taken and for damage to the remainder of that estate.

The trial court granted the intervenors' motion and this Court allowed intermediate appeal by the state from that order. For the purposes of this intermediate appeal, we take it that the facts alleged in the plea in intervention are assumed to be true.

The arguments in the state's brief fall logically in two: first, that this is not a proper cause for intervention, and second, that the intervenors are, under the authority of **Hjorth v. Whittenburg, et al.** (1952), _____Utah_____, 241 P. 2d 907, limited in their choice of forums to the Board of Examiners and the Legislature of the State of Utah. We shall present our argument in these two divisions.

STATEMENT OF POINTS

POINT I: WHERE THE STATE, IN CONNECTION WITH A ROAD CONSTRUUCTION PROJECT, BRINGS AN EMINENT DOMAIN ACTION AGAINST CERTAIN PROPERTY OWNERS, THAT PERSON WHOSE PROPERTY HAS IN FACT BEEN TAKEN, THOUGH NEITHER HE NOR HIS PROPERTY HAS BEEN NAMED IN THE EMINENT DOMAIN PROCEEDINGS, MAY PROPERLY INTERVENE IN THE ACTION TO HAVE HIS DAMAGES FOR THE TAKING AND CONSEQUENTIAL DAMAGES JUDICIALLY DETERMINED.

POINT II: A PROPERTY OWNER WHOSE PROPERTY HAS BEEN TAKEN BY THE STATE OF UTAH WITHOUT DUE PROCESS OF LAW, IS NOT LIMITED TO ADMINISTRATIVE OR LEGISLATIVE REMEDIES.

ARGUMENT

POINT I

WHERE THE STATE, IN CONNECTION WITH A ROAD CONSTRUCTION PROJECT, BRINGS AN EMINENT DOMAIN ACTION AGAINST CERTAIN PROPERTY OWNERS, THAT PERSON WHOSE PROPERTY HAS IN FACT BEEN TAKEN, THOUGH NEITHER HE NOR HIS PROPERTY HAS BEEN NAMED IN THE EMINENT DOMAIN PROCEEDINGS, MAY PROPERLY INTERVENE IN THE ACTION TO HAVE DAMAGES FOR THE TAKING AND CONSEQUENTIAL DAMAGES JUDICIALLY DETERMINED.

It is urged that neither intervention of right nor permissive intervention lies in the case at bar. From our view of intervenors' theory of their cause, this Court need not, on the facts before it, decide whether intervention of right is available to intervenors. If we concede that the intervenors were admitted to the case on discretion of the trial court, there was no abuse of its discretion in so doing.

Rule 24(b), URCP, provides in part: "Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common * * * ." This is one of the grounds for permissive intervention.

On pages 4-5 of its brief, the state sets forth the issues of the case as being "(1) the public necessity of the taking; (2) value of property taken; and (3) severance damage." Those are precisely the issues that we, in our poor way, are endeavoring to place before the trial court as respects the

intervenor's estate in land taken by the state. It is urged that the intervenors' claim would have to be severed for trial. We confess that we thought that was the usual manner of trying eminent domain cases involving highway projects. The last sentence of Section 78-34-6, Utah Code Annotated 1953, would appear to contemplate this possibility, and we note that what is denominated the **main** case seems to be a consolidated action against approximately six different defendants whose property, not necessarily adjacent to each other's, is distributed over a linear distance something in excess of two miles. We cannot refrain from remarking that it would be interesting to observe the trial of the main case in toto before a single jury.

On page 5 of the state's brief it is stated that the issues presented by the intervenors are "(1) whether the Road Commission's entry (upon intervenors' leasehold estate) was privileged and if not (2) what damage was done" to it. We are at a loss to find where this matter of "privileged" entry came in. Surely the Attorney General would not urge that the state, taking possession of property for a public use without bringing a condemnation action, acquires a "privilege"! On page 2 of the state's brief it is alleged that the road commission acquired from the fee-holder by deed the portion of land taken. Apart from the fact that this is a gratuitous, unsworn statement not subject to cross examination, it should be pleaded and proved if it is considered as material. The facts thus stated are certainly not before the Court on this appeal. In any event, a leasehold estate is such an interest in land as to require condemnation. **Korf v. Fleming**, (1948), 237 Iowa 501, 32 NW 2d 85, 3 ALR 2d 270. An easement may be condemned upon an easement. **Whiterocks Irrigation Co. v. Moose-**

man et al., (1914) 45 Utah 79, 141 Pac. 459, and the statute expressly provides that anyone **having an interest** in land named in the complaint may appear and defend, whether or not he is named in the complaint. 78-34-7, Utah Code Annotated 1953.

Although neither the fee-holder nor the land involved herein were named in the complaint, we respectfully submit that intervenors are properly before the Court to determine the questions of the taking of their property and their right to just compensation. Other remedies were available to the intervenors, but this matter will be considered under the next point of argument.

POINT II

A PROPERTY OWNER WHOSE PROPERTY HAS BEEN TAKEN BY THE STATE OF UTAH WITHOUT DUE PROCESS OF LAW IS NOT LIMITED TO ADMINISTRATIVE OR LEGISLATIVE REMEDIES.

Upon oral argument of the motion to intervene and under Point III of the state's brief, the appellant urges that the intervenors are limited in seeking their remedy to presenting their cause to the Board of Examiners and the legislature of this state. Appellant relies upon the case of **Hjorth v. Whittenburg, et al**, supra, as their authority for this proposition.

We respectfully submit that that case is no such authority. In the Hjorth case, the property owner sought consequential damages only, and from the members of the road commission personally. The State of Utah was not even a party. In the case at bar, the intervenors are seeking just compensation for property taken in addition to con-

sequential damages, and they are seeking this remedy against the State of Utah itself. The Hjorth case stands for the proposition that where the members of the road commission act in good faith and without negligence in exercising the authority of the State of Utah, they cannot be held liable personally for damages caused by such action. That rule of law has nothing to do with the case before this Court. The intervenors are seeking in this action to compel the state itself, not the members of its administrative body, to give them just compensation for property taken for public use. This right is guaranteed the intervenors by Article I, Section 22, of the Utah Constitution, and the procedure whereby the interests of persons in the position of the intervenors are protected against the state have been set forth in Chapter 34, Title 78, Utah Code Annotated 1953. The state, so far as intervenors are concerned, has complied with none of the provisions of this legislative act. Strange indeed would be the rule of law which permitted the State of Utah to benefit in any manner from its failure to abide by its organic act and legislation adopted pursuant thereto.

True, the state is a trespasser so far as intervenors are concerned, but intervenors are not seeking relief for a trespass. Intervenors do not attempt in this action to sue the State of Utah in tort. They seek merely to compel the State of Utah to condemn their property according to due process of law. We submit that the case of **Campbell Building Company v. State Road Commission** (1937), 95 Utah 242, 70 P. 2d, 857, is therefore also not applicable to the case at the bar.

Certainly the intervenors could have chosen to present their claim to the Board of Examiners. They could

have sought an injunction against the state and the members of the road commission upon commencement of the project. They could have proceeded in court against the contractor in trespass, and, on the theory of negligence, we believe they could have proceeded against the members of the road commission individually for acts of their agents, under the authority of the Hjorth case. Intervenors have elected to compel the state to condemn their property. Unwise as this election may be, we submit that it lies with the intervenors, not the state.

It is believed that intervenors could have proceeded against the members of the road commission for a writ of mandate to compel them to condemn their property interest. 34 A. J. 937, "Mandamus" Sec. 161. This also they chosen not to do. This would, we submit, have been a wasteful and circuitous route to the same end sought through intervention.

The nub of the state's defense to this intervention is this: it is endeavoring to hide behind sovereign immunity to avoid paying just compensation for property it has taken by virtue of its sovereign power.

We do not believe intervenors' action sounds in tort. Rather, it is brought to enforce a right given them by Article I, Section 22, Utah Constitution. It is our position that this article is self-executing, and that if necessary, we could have brought a separate action against the state to enforce this right. **Milhous v. State Highway Department**, (1940), 194 S. C. 33, 8 SE 2d 852, 128 ALR 1186.

CONCLUSION

Upon this intermediate appeal the state has not raised two questions of law that are inherent in this action: whether a leasehold interest is sufficient interest in land to be the subject matter of condemnation, and whether, if this be so, possession under an unrecorded lease is sufficient notice to the state to avoid the effect of the recording statute. On this latter issue, we respectfully submit that there is no reason for holding that the state is not bound by the general rule announced in **Toland v. Corey** (1890) 6 Utah 392, 24 Pac. 190. Should this Court uphold the ruling of the trial court now before it for review, then, in order to avoid multiplicity of appeals, these issues ought to be disposed of.

We further respectfully submit that the state, in its exercise of sovereign power to take a citizen's property for a public use, is not immune from suit to determine the matter of just compensation for such taking.

Respectfully submitted,

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